Filed 9/17/12 P. v. Darty CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KORY DARTY, Defendant and Appellant.	C065494 (Super. Ct. No. 09F00466)

In this case, defendant, Kory Darty, a drug dealer, and a companion, gunned down a competitor and attempted to gun down three of his competitor's cohorts.

A jury convicted Darty of four counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a) -- counts one through four).[1] As to count one, the jury found Darty personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and

---

[1] Undesignated section references are to the Penal Code.

as to counts two, three, and four that he personally discharged and used a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c)).

Sentenced to state prison for 50 years to life, defendant appeals contending (1) the evidence is insufficient to support the attempted murder convictions in counts two, three, and four; (2) the trial court erred in denying his motion to suppress his identification from a photo lineup; (3) the court erred when it failed, sua sponte, to instruct the jury on attempted voluntary manslaughter as an included offense of the attempted murders charged in all counts; and (4) the prosecutor committed prejudicial misconduct. We reject the contentions and affirm the judgment.

FACTS[2]

In November 2008, defendant was living at the Azure Park Apartments (Azure Apartments) on Sky Parkway in Sacramento. Defendant sold marijuana and was known as "D," "KD," and "the Weed Man." Charles W., Donnell A., Sidney W., and Jonathan F. (all teenagers) hung around the Azure Apartments and also sold marijuana.

In the early evening on November 18, 2008, Charles, Donnell, Jonathan, and Sidney were at a market across the street from the Azure Apartments when, based upon a prior problem, Donnell slapped and/or punched Syra Drones, a young female who

---

[2] The facts are further developed as required by the issues.

was involved with defendant. Drones was angry, crying, and threatened to tell defendant what had happened. She also threatened to return with a gun and then walked off into the Azure Apartments.

About 30 minutes after the fight with Drones, Charles and his group were standing in front of the Azure Apartments when two men walked toward them asking for some "tree" or "weed," meaning marijuana. Jonathan gave Charles a bag of marijuana to sell to them and Charles walked away toward the two. Charles recognized one of the men as defendant, having met him in Charles's aunt's apartment in the complex, but Charles did not know the other man.

Charles gave defendant's companion a bag of marijuana and as that man was handing Charles the money, defendant started shooting at Charles. Defendant's companion joined in the shooting and Charles was shot five to six times and fell to the ground. Charles had gunshot wounds to his abdomen, lower back, left arm, left leg, and bottom of his left foot.

Devon Washington, who knew defendant, Charles, Sidney, and Jonathan, testified that he came out of the market and saw Charles, Sidney, and Jonathan across the street in front of the Azure Apartments. Charles was talking to two men. Washington watched as the two men started backing away from Charles as they were shooting him with handguns. From the light generated by the muzzle flashes of the guns, Washington identified defendant, who was wearing a black sweatshirt with the hood up, as one of

the shooters. Washington thought he heard "at least 20" gunshots.

Sidney, Jonathan, and Donnell testified that after the shooting started, they ran and heard the bullets striking the metal gate near them. Donnell testified that for a shooter to have shot at them after shooting at Charles, "[h]e would have had to turn the gun to be facing towards us." Neither Sidney, Jonathan nor Donnell was shot, and they escaped by running into the apartment complex.

Jason Lyle knew defendant from having purchased marijuana from him. The night of the shooting, Lyle called defendant and arranged to buy marijuana from him. Lyle arrived at the Azure Apartments, parked his car and walked over to defendant and bought marijuana from him. As the two were talking, defendant told Lyle to "hold on real quick" and walked away. As Lyle waited he heard gunshots. Defendant returned with a man in a wheelchair, and the two got into Lyle's car. Defendant was wearing gloves and had a gun, and Lyle thought he was wearing dark clothing. Defendant told Lyle, "Let's go." When Lyle just sat there, defendant and the other man got out of the car and left.

At trial, Donnell claimed he was unable to identify defendant as one of the shooters, but admitted that he had told a police officer that he "saw the people who were shooting." Detective Robert Stewart testified that in audio/video recorded statements, Donnell identified defendant as one of the shooters and said that he was wearing a "black hoodie" and gloves.

Emergency personnel transported Charles to a hospital where he remained for approximately two months. As a result of his injuries, Charles is paralyzed from the waist down. Crime scene investigators found 17 expended shell casings, seven of which were .380-caliber and were fired from the same gun, the other 10 were .25-caliber and were fired from two guns. No fingerprints were found on the casings.

DISCUSSION

I

Defendant contends the convictions for attempted murder of Sidney (count two), Donnell (count three), and Jonathan (count four) must be reversed because the evidence is insufficient to establish either an intent to kill each of them or that they were in a "kill zone," which is a group of persons into which shots are intentionally being fired. We conclude the evidence is sufficient to establish a direct intent to kill each victim and, therefore, we need not address the kill zone theory.

"'In reviewing the sufficiency of the evidence to support a judgment of conviction, we examine the entire record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Coffman* (2004) 34 Cal.4th 1, 87.)

In *People v. Stone* (2009) 46 Cal.4th 131, the court explained the two theories of attempted murder -- the intent to

kill a specific person and the kill zone theory. "'Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder . . . if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of attempted murder of the victim, but not of others.' [Citation.]."[3] (*Id.* at p. 136.)

Although defendant claims the prosecution "[i]n the instant case relied on the kill zone theory to establish the attempted murder of [Charles's] three companions," the record shows the

---

[3] *Stone* went on to explain, "[H]owever, . . . if a person targets one particular person, under some facts a jury could find the person *also*, concurrently, intended to kill -- and thus was guilty of attempted murder of -- other, nontargeted persons. [In] *Ford v. State* (1993) 330 Md. 682, we explained that 'the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [the *Ford* court] termed the "kill zone."' [Citation.] For example, if a person placed a bomb on a commercial airplane intending to kill a primary target, but also ensuring the death of all the passengers, the person could be convicted of the attempted murder of all the passengers, and not only the primary target. [Citation.] Likewise, in [*People v. Bland* (2002) 28 Cal.4th 313], '[e]ven if the jury found that defendant primarily wanted to kill [a driver] rather than [the] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers.' [Citation.]" (*People v. Stone, supra,* 46 Cal.4th at p. 137, original italics.)

prosecutor also argued that defendant specifically attempted to kill each victim, i.e., a direct kill theory. The prosecutor posited two potential motives for the shootings -- defendant's anger at Charles and his companions for the assault on Syra Drones (with whom he had been sexually involved), and his displeasure with Charles's group for selling marijuana on defendant's territory. The prosecutor then argued that for either of these reasons the shooters not only intended to kill Charles, but after shooting him "they turn [their] guns and shoot at the other kids that are there," which is a direct attempt to kill theory.[4] The jury was instructed pursuant to CALCRIM No. 600, on both theories of attempted murder.[5]

---

[4] The prosecutor also argued that it did not matter whether the shooters intended to kill any specific companion of Charles's who were grouped nearby if the evidence showed that the shooters, or anyone of them, fired several shots into the group, which was a kill zone theory.

[5] The court instructed the jury on attempted murder pursuant CALCRIM No. 600: "The defendant is charged in Counts 1-4 with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took direct but ineffective steps toward killing another person; and [¶] 2. The defendant intended to kill that person. [¶] A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person may intend to kill a specific victim or victims and at the same

The evidence is sufficient that the shooters were specifically attempting to kill Charles, Donnell, Sidney, and Jonathan. After having shot Charles five to six times at close range, a clear indication of their intent to kill him, the shooters then turned their fire and shot at least 11 to 12 more times in the direction Donnell, Sidney, and Jonathan were running. The 17 expended casings found at the scene and the trio of victims hearing the bullets striking the metal gate as they ran adequately established the shooters' intent to kill each victim. Consequently, we conclude the evidence is sufficient to support attempted murder convictions in counts two, three, and four on the theory of a specific intent to kill each victim.

Our conclusion renders it unnecessary for us to address defendant's contention the evidence is insufficient to support the attempted murders in counts two, three, and four on a kill zone theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an

---

time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of a charged victim, the People must prove that the defendant not only intended to kill the charged victim but also either intended to kill the charged victim, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill the charged victim or intended to kill the charged victim by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of the charged victim." (Original italics.)

affirmative indication in the record that the verdict did not rest on the inadequate ground"].)

II

Defendant contends reversal of all counts is necessary because his due process right to a fair trial was abridged when the trial court denied his motion to exclude his in-court and photo lineup identifications, which were shown to the witnesses, as impermissibly suggestive. We find the motion was properly denied.

"[A]n eyewitness identification at trial following a pretrial identification from a photo lineup is not precluded unless the photographic identification procedure is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citations.]" (*People v. Ingle* (1986) 178 Cal.App.3d 505, 511-512.)

Assuming for the sake of argument that the photo lineup used herein was suggestive, there was no substantial likelihood that the suggestiveness gave rise to defendant's having been misidentified as one of the shooters. Charles Charles had personally met defendant at his aunt's apartment at the Azure Apartments, he was familiar with defendant as a seller of marijuana at the apartment complex, and he was within a few feet of defendant when defendant shot him.

Devon Washington knew defendant because he had purchased marijuana from him. Washington was just across the street from where the shooting took place and he recognized defendant when

the muzzle flashes produced by the multiple shots that were fired illuminated defendant's face.

Although Donnell did not, or would not, identify defendant in court, in an audio-video recording he told Detective Stewart that it was defendant who did the shooting and described defendant as wearing a black hoodie and gloves.

Just before the shooting, Jason Lyle (who knew defendant) had driven to the Azure Apartments to buy marijuana from him. As Lyle got out of his car defendant walked over and sold Lyle some marijuana. Lyle thought defendant was wearing "maybe dark-colored clothing." Defendant told Lyle to "hold on real quick" and left. A few minutes later, as Lyle waited, he heard gunshots. Defendant returned along with a man in a wheelchair. Defendant was wearing gloves and carrying a gun. Defendant and his companion got into Lyle's car, and defendant said, "Let's go." When Lyle did not respond, defendant and his companion got out of the car and left.

Given the foregoing, overwhelming evidence, there is no substantial likelihood that any suggestiveness in the photo lineup gave rise to a substantial likelihood of mistaken identity of the in-court identifications.

III

Defendant contends the trial court committed reversible error when it failed to instruct the jury, sua sponte, on the included offense of attempted voluntary manslaughter based upon heat of passion. We disagree.

"Voluntary manslaughter is a lesser included offense of murder. [Citation.] One form of the offense is defined as the unlawful killing of a human being without malice aforethought 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).) 'The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, 'this heat of passion must be such passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . .'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215-1216.)

Defendant argues that Donnell's assault on Drones about which she immediately told him, angered defendant and he left the apartment within minutes of her telling him. Additionally, Drones testified she had been assaulted by Donnell because she purportedly told defendant that "these guys were going to rob him."

The argument is unpersuasive. A reasonable person, upon hearing that his girlfriend has been slapped or punched, does not arm himself with a firearm, find a companion who is similarly armed, and seek out and attempt to kill the assailant and those associated with him. And even assuming, at some undisclosed point in the past, Drones told defendant that Charles and his companions were planning on robbing him, a

lethal preemptive strike against them is not a legal or reasonable response. Simply put, there was no evidentiary basis for a heat of passion instruction, and hence there was no error in not giving one. "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton, supra,* 4 Cal.4th at p. 1129.) Because the evidence was insufficient to give rise to a reasonable heat of passion instruction, there was no basis for the giving of an instruction on attempted voluntary manslaughter and the court cannot be faulted for not giving such an instruction.

IV

Defendant contends the prosecutor committed prejudicial misconduct during rebuttal argument. We conclude the contention is forfeited; in any event, it is meritless.

During the prosecutor's rebuttal, he was apparently attempting to argue to the jurors that in determining and drawing inferences from the facts, they should use their common sense just as if they were sitting in a coffee shop, telling a friend what had occurred at trial. Defendant cites the following portion of that argument:

"You can tell your friend about all the motivations, all the witnesses. At the end your friend will say, what was your decision? What did you do?

"You can sit there and say, we acquitted him, we found him not guilty. *Your friend will look at you sort of cross-eyed and say, well, you just told me about all this evidence, and talked*

to me about witnesses and explained why they were lying and the fact they could be killed if they identified someone and, yet, some came in and testified despite all of that.

"The reason I tell this story is, when you are sitting down in a coffee shop explaining to a friend and you are using your common sense and laying out the picture the way you think about things and the way things interrelate. Don't change simply because you are a juror now.

"[DEFENSE COUNSEL]: I will object. It is improper.

"THE COURT: Overruled.

"[PROSECUTOR]: Your common sense that you apply in a coffee shop in terms of why would he have a motive to do this? This timing works out. All of those things apply equally here. Don't think differently in terms of applying your common sense just because you are a juror." (Italics added by defendant.)

Defendant argues "the prosecutor's comment was a clear suggestion that the jury should consider the reaction from their friends, who would think that a verdict of not guilty would be unreasonable."

First, "'[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Defense counsel's interjection, "I will object. It is improper," falls far short of specifying any ground for the objection. Indeed, every

objection is based upon something that the objector deems improper, otherwise there would be no basis whatsoever for the objection. Because the objection that whatever is being challenged is "improper" fails to specify any basis for the objection, the issue is forfeited for appeal.

Second, even if the objection were not forfeited, we would find it meritless as it is argued by defendant. Noting that "[a] warning of probable consequences of failure to convict, and of the unfavorable reactions of neighbors is improper" (*People v. Purvis* (1963) 60 Cal.2d 323, 342), defendant argues "the prosecutor's comment was a clear suggestion that the jury should consider the reaction from their friends" in determining defendant's guilt.

Contrary to defendant's interpretation of the prosecutor's comment, the comment was an attempt to explain to the jurors that they should use their common sense in determining the facts and the inferences to be drawn therefrom. Indeed, the prosecutor expressly disavowed defendant's interpretation of his argument when, prior to making the challenged argument, he told the jury: "I do not tell this story or give this analogy to make you think that you should worry about what your neighbor thinks about your decision or ultimately what you decide to do in this case. . . ." Moreover, the court instructed the jury: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, *based only on the evidence that has been presented to you in this trial.* [¶] Do

not let bias, sympathy, prejudice, *or public opinion* influence your decision." (Italics added.)

Defendant offers no reason to believe the jurors did not heed the admonitions and instructions. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [in the absence of evidence to the contrary, appellate court presumes the jury understood and followed the court's instructions].) Consequently, defendant's contention is rejected.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.